IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 19 of 1987

LR'S OF MOHAMMAD SAFFI
V/S
LR'S OF PRITHVI RAJ

Mr. KEWAL CHAND SAMDARIA, for the appellant / petitioner

Mr. NS ACHARYA, for the respondent

Date of Order : 20.7.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This appeal has been filed by the defendant against the judgment and decree of the learned lower Appellate Court dated 28.1.87, dismissing appeal against the judgment and decree of the learned trial Court dated 27.4.84, whereby the suit of the plaintiff was decreed for eviction and arrears of rent.

The relevant facts of the case are, that on 7.2.80 the plaintiff filed the present suit for eviction, on the ground of reasonable and bonafide necessity, pleading comparative hardship, and also pleading, that earlier the plaintiff had filed a suit for eviction on the ground of default, wherein vide judgment dated 3.4.78, that suit was dismissed, by giving the defendant the benefit of Section 13-A, as the amount determined on 4.3.76 was deposited, however, thereafter it was alleged, that defendant has not

paid any rent. Thus, the ground of second default was pleaded. Then in para-11 it was pleaded, that the dismissal of the earlier suit was challenged in appeal, and the appellate Court, while dismissing the appeal, observed, that this judgment will not operate as res-judicata. Be that as it may, the defendant contested the suit, denying the allegations of reasonable and bonafide necessity and comparative hardship. It was also pleaded, that the suit is barred by principles of res-judicata. Then regarding default, it was pleaded, that the defendant time and again offered the rent to the plaintiff, but he did not receive, therefore, it was deposited in the Court under Section 19-A of the Act. Inter-alia on these pleadings, it was pleaded, that the suit is liable to be dismissed.

The learned trial Court framed 5 issues. The first one related to the question of reasonable and bonafide necessity, the second issue related to the comparative hardship, third issue related to the question of second default, while the fourth issue related to the question of res-judicata, and issue No.5 was about relief. These issues were framed on 28.7.82. Thereafter the case went on and the defendant was given number of opportunities to lead evidence, however ultimately, on 27.4.84 since nobody appeared on the side of the defendant, the learned trial Court drew the order-sheet, to the effect, that nobody is present on the side of the defendant, nor any evidence is

present, and since the plaintiff's evidence is already over, the judgment was separately dictated, and the suit was decreed. Against this decree, the defendant filed an appeal before the learned lower Appellate Court on 14.5.84.

In the meanwhile, on 30.4.84 the defendant filed an application under Order 9 Rule 13 read with Section 151 CPC, which was registered by the learned trial Court as Civil Misc. Case No.63/84, wherein notices were ordered to be issued, and the matter went on for quite number of hearings, and it was ultimately on 25.4.85, that the defendant did not press the application unconditionally, and got it dismissed.

In this sequence, the appeal was argued, and vide judgment dated 28.1.87, as noticed above, it was dismissed.

Learned trial Court found all the four issues in favour of the plaintiff. Before the learned lower Appellate Court, the propriety on the part of the learned trial Court in deciding the suit on 27.4.84 was challenged, inter-alia on the ground, that on that day the defendant was present in the Court, and had just gone to call the advocate, and by the time he came, the suit was decreed. Thus, he was not given sufficient opportunity to lead evidence. This contention has been negatived by the learned lower Appellate Court, by observing, that the defendant had

already been given 14 opportunities to lead evidence, and the story propounded was not believed on the ground, that had the things been so he would have filed application on that day itself, and not after 4 days, i.e. on 30.4.84. Then findings of the learned trial Court on issues No.1 to 4 were examined on merits also, and were upheld.

This appeal was filed on 3.3.87, and vide order dated 3.3.87 itself, show cause notice was ordered to be issued, and after service, vide order dated 13.7.87, the appeal was admitted by framing the following substantial question of law:

> "Whether in the facts and circumstances of this case learned Munsiff Magistrate was justified in decreeing the suit of plaintiff instead of first proceeding in he matter under Order 17 Rule 2 of C.P.C.?"

Arguing the appeal on this question, learned counsel for the appellant placed strong reliance on the judgment of Hon'ble the Supreme Court, in Prakash Chander Manchanda & Anr. Vs. Janki Manchanda, reported in AIR 1987 SC 42, to contend, that the action of learned trial Court is bad. Elaborating the argument, it was submitted, that on the face of language of Order 17 Rule 2, and Order 17 Rule 3, the trial court could proceed under Order 17 Rule 3 only, if some evidence had been led on the side of the

defendant, treating the defendant to be present, despite absence, since in the present case, no evidence has been led on the side of the defendant, the only option available to the learned trial Court was, to proceed in the manner provided by Order 9 CPC.

In view of the sequence of facts above, learned counsel for the appellant was pointedly asked as to what would have been the consequence of proceeding in accordance with the provisions of Order 9, the answer given was, that in that event, the appellant could have filed an application for setting aside the exparte decree under Order 9 Rule 13.

Learned counsel for the respondent on the other hand supported the impugned judgments and decrees.

I have gone through the record and the judgment of the Hon'ble Supreme Court.

A look at the judgment of Hon'ble Supreme Court shows, that therein also, the case was fixed for defendant's evidence, and after some adjournments also nobody appeared on the side of the defendant, then the case was fixed for arguments, on that day also nobody appeared, and the case was adjourned. Then the plaintiff's counsel was heard and the case was fixed for judgment, still nobody

appeared, then the case was again postponed on 21.11.85, and the judgment was dictated, and the suit was decreed. Thereafter, the defendant filed an application under Order 9 Rule 13 for setting aside the exparte decree, which was dismissed by the trial Court, holding that the suit was disposed of in accordance with Order 17 Rule 3, and not in accordance with Order 17 Rule 2, therefore, the application was dismissed as not maintainable. Against that order, a review petition was filed, which was also dismissed, then first appeal was filed, which was dismissed summarily. In those fats, Hon'ble the Supreme Court drew the distinction between Order 17 Rule 2 and Order 17 Rule 3, and found, that the course open to the learned trial Court was to proceed under Order 17 Rule 2, with the result, that the application could not be dismissed as not maintainable, and therefore, the appeal was allowed, and trial Court was directed to consider the application under Order 9 Rule 13, and dispose of it in accordance with law.

In my view there is no dispute about the legal proposition propounded in the aforesaid judgment. However, the facts in the present case are much more different. Inasmuch as, as noticed above, it was way-back on 30.4.84 itself, that the appellant did file an application purportedly under Order 9 Rule 13, making all averments required by Order 9 Rule 13, and also making prayer for the reliefs covered by Order 9 Rule 13 itself. That application

was entertained, and notices were ordered to be issued to the plaintiff. The matter went on for quite long period of time, however, as noticed above, it was on 25.4.85 that the appellant, for reasons best known to him did not like to press that application, and unconditionally, and therefore, it was dismissed. In that view of the matter, the present is not a case, where the request of the appellant, made under Order 9 Rule 13, may have been turned down, treating the judgment to be one under Order 17 Rule 3, instead of Order 17 Rule 2. Thus, the judgment in Prakash Chander's case does not help the appellant on facts.

That being the position, in my view, substantial question of law, as framed, does not even arise in the present case, as the parties were ad idem, that the judgment dated 27.4.84 is exparte, and therefore, the appellant did file application under Order 9 Rule 13, and thereafter, he voluntarily did not choose to press it unconditionally. In that view of the matter, the question as framed is answered in the manner, that in view of the appellant having already filed application under Order 9 Rule 13, and having not pressed it, the question does not at all arise in the present case.

No other question was argued.

The appeal is, therefore, dismissed. The parties

shall bear their own costs.

At the request of the learned counsel for the appellant, the appellant is given six months' time to vacate the suit premises on the condition that the defendant gives an undertaking before the learned trial court within one month from today that on or before the expiry of the above period, he will peacefully hand over the vacant possession of the suit premises to the plaintiff and that during this period, he will not, in any manner, transfer the possession of the suit premises to anybody. Likewise, the entire decretal amount, so also all arrears of rent, if any, shall be deposited by the appellant in the trial court within one month from today and shall further continue to deposit amount equal to the monthly rent by way of damages for use and occupation by 15th of each succeeding month, till the actual delivery of possession. In case the appellant fails to comply with any of the above conditions, the respondent will become automatically entitled to execute the decree forthwith.

(N P GUPTA),J.

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